

Fourth Amendment Small Claims Court

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I. INTRODUCTION

This Essay proposes that some state or locality create a specialized constitutional small claims court to investigate and adjudicate alleged Fourth Amendment violations, as a supplement to the existing mix of remedies.¹ The system would effectively create room for that jurisdiction to ask the courts to replace the *mandatory* exclusionary rule with a fault-based alternative, and would create a meaningful forum for the innocent parties who are now largely excluded from any form of redress.² Depending on volume, in some jurisdictions the portfolio might simply be added to the magistrates or judges who hold small claims court now. Sometimes there is virtue in thinking small. A single state or municipality, acting as a "laboratory of democracy," will tell us more about the real-world effects of such a change than any abstract theorizing ever could.

This Essay takes seriously the expressed interest of members of the Supreme Court and puts forward one alternative to the mandatory exclusionary rule in Fourth Amendment cases, following Professor Christopher Slobogin's suggestion

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¹ Justice Burger issued just such an invitation to Congress in his dissenting opinion in *Bivens v. Six Unknown Named Agents*. See 402 U.S. 388, 422-23 (1971) (Burger, C.J., dissenting). According to Justice Burger:

A simple structure would suffice. For example, Congress could enact a statute along the following lines:

- (a) a waiver of sovereign immunity as to the illegal acts of law enforcement officials committed in the performance of assigned duties;
- (b) the creation of a cause of action for damages sustained by any person aggrieved by conduct of governmental agents in violation of the Fourth Amendment or statutes regulating official conduct;
- (c) the creation of a tribunal, quasi-judicial in nature or perhaps patterned after the United States Court of Claims, to adjudicate all claims under the statute;
- (d) a provision that this statutory remedy is in lieu of the exclusion of evidence secured for use in criminal cases in violation of the Fourth Amendment; and
- (e) a provision directing that no evidence, otherwise admissible, shall be excluded from any criminal proceeding because of violation of the Fourth Amendment.

Id. at 422-23.

² *Id.* at 422 (Burger, C.J., dissenting). ("Such a statutory scheme would have the added advantage of providing some remedy to the completely innocent persons who are sometimes the victims of illegal police conduct—something that the suppression doctrine, of course, can never accomplish.").

that we “chuck it,” so long as it can be replaced by something else, and extending Professor David Harris’s work on the role that cameras and accountability can play in increasing compliance with the Fourth Amendment.³ It assumes that the Court remains committed to the view that the exclusionary rule is mandated only so long as it is the only tool the courts have to encourage law enforcement to follow the Fourth Amendment.⁴ This leaves room for the states to experiment with providing Fourth Amendment enforcement alternatives,⁵ with the option of then seeking dispensation from the courts in criminal cases that would otherwise involve exclusion. And it argues that the current mix of remedies is not optimal—in fact we may get less enforcement of the Fourth Amendment with the mandatory exclusionary rule than we would if we were to trade it for discretionary exclusion and even a very nominal damages regime. Moreover, mandatory exclusion extracts a legitimacy price, and quite possibly a rise in wrongful convictions because it distorts public perceptions regarding the trial as a quest for truth.⁶ It also assumes that with all its flaws, the mandatory rule is far better than *nothing*. That means that we *should* seek an alternative—not simply scrap the rule. Any such alternative must be universally available to the public in the jurisdiction seeking exemption from the mandatory rule; simple, effective, affordable; and designed to increase law enforcement’s legitimacy in the eye of the public. Crafting any viable alternative will require the involvement of the political

³ See Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 364 (1999) [hereinafter *Chuck the Exclusionary Rule*] (arguing that the exclusionary rule “ought to be limited dramatically” and that an administrative damages regime should take its place); H. Mitchell Caldwell, *Fixing the Constable’s Blunder: Can One Trial Judge in One Country in One State Nudge a Nation Beyond the Exclusionary Rule?*, 2006 BYU L. REV. 1, 32 (2006).

⁴ I deliberately exclude the Fifth Amendment context, where the Constitutional text mandates exclusion.

⁵ See, e.g., Scott Sundby, *Mapp v. Ohio’s Unsung Hero: The Suppression Hearing as Morality Play*, 85 CHI.-KENT L. REV. 255, 255 (2010) (“Recent opinions, most notably by Justice Scalia, have sparked speculation that the Roberts Court may be inclined to overrule *Mapp v. Ohio* and send Fourth Amendment disputes back to the realm of civil suits and police disciplinary actions.”). For discussion of exclusion and money damages as substitutes, see John C. Jeffries, Jr., *Disaggregating Constitutional Torts*, 110 YALE L.J. 259, 283 (2000) (“We conceivably could have both, but unless we are willing to sacrifice the Fourth Amendment completely, we could not have neither.”). Other scholars who suggest alternate remedies include Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 759 (1994) (“[W]e must use twentieth-century legal weaponry like *Bivens* actions, class actions, structural injunctions, entity liability, attorney’s fees, administrative regulation, and administrative remedies, to combat twentieth-century legal threats—technology and bureaucracy—to the venerable values protected by the Fourth Amendment.”); Randy E. Barnett, *Resolving the Dilemma of the Exclusionary Rule: An Application of Restitutive Principles of Justice*, 32 EMORY L.J. 937, 969–80 (1983) (proposing a system of restitution in place of exclusion); *Chuck the Exclusionary Rule*, *supra* note 3, at 420 (proposing money damages).

⁶ See Tonja Jacobi, *The Law and Economics of the Exclusionary Rule*, 87 N.D. L. REV. 585, 594 (2011). (“[T]he exclusionary rule is not simply costly in terms of lost convictions, it is also harmful to innocent defendants and non-defendants. Thus, even as a purely expressive mechanism, the exclusionary rule is not well tailored to its goals.”).

branches as well as the courts, so it must be politically viable as well. All of this is a tall order.

As Professor Christopher Slobogin has noted elsewhere, “The [mandatory exclusionary] rule is a poor deterrent because it imposes only weak punishment and confers even weaker rewards on the individual officer, and because it actually encourages disrespect for the Fourth Amendment.”⁷ Slobogin proposed “the adoption of an independent entity for bringing damages claims, a judicial hearing process, and a liquidated damages scheme—or, more accurately, an administrative penalty system that has elements of a damages action.”⁸ Professor David Harris’s proposal comes the closest to the one offered here, which is offered in the same spirit. Harris favors three components in combination: data-driven early intervention systems, increased recording of police citizen interactions to permit oversight, and “substantial adjustments to the law that would restore litigation as a serious tool for redressing violations of the Fourth Amendment.”⁹ My proposal offers a cheap and simple option to address the concerns that underlie Harris’s third point. This preemptive adoption of “accountability-based policing” should happen before, not after, the courts dispense with the exclusionary rule.¹⁰ Slobogin and Harris are on the right track. In this author’s view, their proposals, and a similar one offered in California by state Senator Robert Pressley,¹¹ can be improved or extended by rethinking the commitment to adversarialism that underlies so much of our system.

⁷ *Chuck the Exclusionary Rule*, *supra* note 3, at 366.

⁸ *Id.*

⁹ David A. Harris, *Accountability-Based Policing Can Reinforce—Or Replace—The Fourth Amendment Exclusionary Rule*, 7 OHIO ST. J. CRIM. L. 149, 166 (2009). Harris believes that three changes are necessary to make litigation effective in any meaningful way, either as an adjunct to or substitute for the exclusionary rule:

First, we must come to grips with the way the qualified immunity doctrine distorts the effectiveness of litigation against police officers. Second, Congress must undo two of the Court’s decisions interpreting the statute providing for attorney’s fees in civil rights cases. Third, any damage awards resulting from police misconduct lawsuits must be payable only out of the budget of the police department itself.

Id. at 181. I agree with Harris’s first two points almost entirely. The police should be in the business of monitoring their own actions, and supervisors should track when and how officers interact with the public, particularly when they engage in searches or seizures. Recording offers benefits for the officers and for the public. Officers will avoid spurious claims made by individuals who have violated the law, and the public will avoid the circling the wagons behavior that can typify bad departments.

¹⁰ *Id.* at 194. (“What we actually want is not the exclusion of evidence, but the transmission of a message to the police officer and the police department: ‘If you break Fourth Amendment rules to gather evidence, you will suffer negative consequences that matter to you. You can avoid this outcome in the future by following the Fourth Amendment.’”).

¹¹ See Robert C. Fellmeth, *The Optimum Remedy for Constitutional Breaches*, 26 PEPP. L. REV. 923, 959 (1999) (discussing the proposal). Fellmeth, in a very detailed proposal aimed at California, recommends a range of equitable civil remedies and damages administered by the courts. *Id.* at 967–70.

Instead of thinking big—big awards, big shifts in police behavior—we should think small: small awards, incremental improvements, ending not *all* exclusion but *mandatory* exclusion. Under my proposal, states or localities would create a specialized small claims court, staffed by judges tasked with responding to citizen-initiated complaints.¹² The judge would have an enhanced portfolio, modeled on the continental investigating judge.¹³ He or she would receive a citizen allegation that the police had violated their rights, subpoena and review available videos of the incidents, make written findings, and in appropriate cases fine police departments and award liquidated damages to citizens, along with ordering personal letters of apology from the officers involved and their supervisors.¹⁴ Findings would be public records, and forwarded to the appropriate department where they would become part of any officer's permanent employment record. They would be available to supervisors for evaluations, as well as potentially discoverable in the event of a § 1983 action¹⁵ in a future case involving the department.

Technological advances including body-worn video and the internet have made this approach possible at an affordable price in a transparent and legitimate

¹² There is a long and varied scholarly literature proposing alternatives to the exclusionary rule. See, e.g., Barnett, *supra* note 5, at 969–80 (proposing damage-based procedure); Robert Batey, *Deterring Fourth Amendment Violations Through Police Disciplinary Reform*, 14 AM. CRIM. L. REV. 245, 252–56 (1976) (proposing internal police department disciplinary system); Guido Calabresi, *The Exclusionary Rule*, 26 HARV. J. L. & PUB. POL'Y 111, 115–16 (2003) (proposing the use of sentence discounts post-conviction); Michael J. Daponte, *Discretion and the Fourth Amendment Exclusionary Rule: A New Suppression Doctrine Based on Judicial Integrity*, 30 MCGEORGE L. REV. 1293, 1311–23 (1999) (proposing discretionary suppression under a balancing test); Robert P. Davidow, *Criminal Procedure Ombudsman Revisited*, 73 J. CRIM. L. & CRIMINOLOGY 939, 939–41 (1982) (proposing the use of a combination of juries and ombudsman); Fellmeth, *supra* note 11, at 967–70 (recommending a range of equitable civil remedies and damages administered by the courts, in a very detailed proposal aimed at California); Carl McGowan, *Rule-Making and the Police*, 70 MICH. L. REV. 659, 690 (1972) (proposing agency rulemaking); L. Timothy Perrin et al., *If It's Broken, Fix It: Moving Beyond the Exclusionary Rule—A New and Extensive Empirical Study of the Exclusionary Rule and a Call for a Civil Administrative Remedy to Partially Replace the Rule*, 83 IOWA L. REV. 669, 744–52 (1998) (proposing administrative damages proceedings to address violations); Virgil W. Peterson, *Restrictions in the Law of Search and Seizure*, 52 NW. U. L. REV. 46, 62 (1958) (proposing investigation via a civil rights office); *Chuck the Exclusionary Rule*, *supra* note 3, at 366 (proposing monetary penalties combined with suppression in egregious cases); James Stribopoulos, *Lessons from the Pupil: A Canadian Solution to the American Exclusionary Rule Debate*, 22 B.C. INT'L & COMP. L. REV. 77, 82–83 (1999) (proposing a Canadian-style discretionary exclusionary rule); Malcolm Richard Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 JUDICATURE 214, 231–32 (1978) (proposing a post-trial proceeding and money damages).

¹³ See John Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 824, 824–26 (1985) (explaining that continental judges “take[] the main responsibility for gathering and sifting evidence” and gathers and evaluates evidence over a series of hearings, rather than in a single proceeding).

¹⁴ *Id.* at 824–26.

¹⁵ 42 U.S.C. § 1983 (2006).

way.¹⁶ Small claims courts in numerous jurisdictions prove that the requirements of due process can be provided without the need for a full adversarial process of the kind associated with a trial. Separation of powers concerns can be met with the designation of these powers to an entity answerable to the courts.¹⁷ Prosecutorial discretion is not implicated because these would be expressly civil awards. The extent to which citizens need counsel or some other intermediary to make challenges to government action legitimate, either constitutionally or as a requirement of perceived legitimacy, will need to be explored, and is probably unknowable *ex ante*. This essay therefore concludes that the proposal passes due process, and that the best way to determine the effects on all of the various axes of legitimacy is to implement it on a trial basis and track the results.

This Essay proceeds in four parts. Part I shows why the current system is broken and an alternative remedy should be added to the mix. Part II briefly recounts the Court's current position on the exclusionary rule, and determines that there is at least an implicit invitation to the states to proceed. Part III expands the details of the proposal and considers potential costs and benefits, including a brief survey of the literature that has gone before it. Part IV concludes.

II. THE NEED FOR A REMEDY OTHER THAN EXCLUSION

Let us begin with some core concepts. Assume that you are drafting a constitution with some commitments to individual rights. You believe, as one of these commitments that government abuse of power in the form of unreasonable searches and seizures of its citizens needs to be checked. But you also know that there will need to be searches and seizures in appropriate circumstances. It will be impossible to tell, *ex ante*, which will be unreasonable, so someone will need discretion to decide when the lines have been crossed. You also recognize that there will be intense political pressures to ignore that commitment in particular cases, especially when there are serious crimes committed. You might separate powers and assign that job to common law courts, which would be flexible, and politically insulated. Warrants, which serve as an *ex ante* defense, would be available only in limited circumstances, and only when they describe with particularity the place to be searched and the things to be seized. Otherwise, as a matter of separation of powers, you want to allocate to the courts the power to oversee the executive branch's actions.

The constitutional commitment is to be reasonable, which is not a defined quantum, and therefore can (and should) vary from time to time, depending on

¹⁶ For a more extended discussion of the emergence of body-worn video, see Richard E. Myers II, *Challenges to Terry for the Twenty-First Century*, 81 MISS. L.J. 937 (2012) (examining the emergence and policy implications of body-worn video), and David A. Harris, *How Accountability-Based Policing Can Reinforce—Or Replace—The Fourth Amendment Exclusionary*, 7 OHIO ST. J. CRIM. L. 149, 175–79 (2009) (extensive discussion of same).

¹⁷ See Fellmeth, *supra*, note 11, at 959.

local conditions. The oversight powers available to the courts and the damages available to the citizen, in the event that their rights were violated, should also vary. That is essentially what happened at the framing; the inherently flexible tort remedy was considered to be part of the court's ability to shape the common law of searches and seizures.¹⁸ Perhaps not surprisingly, this power to fashion a range of remedies, up to and including exclusion of the evidence, is available in common law courts outside the United States.¹⁹ In the U.S., it is complicated by the dual federalism problem, and the fact that the federal courts are intervening in the operations of independent sovereigns. When the state courts refused to participate in oversight of local authorities, the federal courts adopted an exclusionary remedy and enforced it via the writ of habeas corpus. It limited its enforcement to civil cases. Congress stepped in and fashioned a civil remedy in the form of 42 U.S.C. § 1983, providing for civil damages in a range of cases, albeit with massive exceptions. The federal courts in *Bivens* implied a similar civil right in federal court, to extend the protections of the Fourth Amendment to innocent parties.²⁰

Figuring out when the courts are being appropriately countermajoritarian, and when they are overreaching is notoriously difficult.²¹ Exclusion of the unconstitutionally seized evidence in criminal cases is in some ways a self-calibrating mechanism, because it forces the courts to pay for the constitutional commitment in the form of their own legitimacy. Keeping reliable evidence out of a trial that is supposed to be a quest for the truth is generally a bad thing. Letting guilty and potentially dangerous people go is a bad thing. But so is condoning illegal government conduct. This means that the courts will attempt to balance the use of the rule doctrinally, by creating categories of exceptions, and by defining reasonableness in part by the nature of the remedy that they have to employ.

The exclusionary remedy functions crudely because it is binary: evidence is either excluded or it is not. This suggests that we need a more calibrated mechanism, hence the need for a range of options in addition to exclusion that the courts can use to enforce the rule. I will return to the difference in legitimacy between Fourth Amendment compliance purchased through financial motivations

¹⁸ This is obviously a gross oversimplification and is intended to be. See Amar, *supra* note 5, at 811–816; Donald Dripps, *Akhil Amar on Criminal Procedure and Constitutional Law: Here I Go Down That Wrong Road Again*, 74 N.C. L. REV. 1559, 1632–33 (1996); *Chuck the Exclusionary Rule*, *supra* note 3.

¹⁹ For example in Canada and Australia. It is also available in continental systems, such as in Germany and France; see Craig M. Bradley, *Mapp Goes Abroad*, 52 CASE W. RES. L. REV. 375, 387–91 (2001).

²⁰ A full exploration of the scope and limits of § 1983 and *Bivens* actions is beyond the scope of the paper. For excellent treatment of the subject, see William A. Schroeder, *Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule*, 69 GEO. L.J. 1361 (1980–81); Ivan E. Bodensteiner, *Congress Needs to Repair the Court's Damage to §1983*, 16 TEX. J. C.L. & C.R. 29 (2010); Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532 (1972); Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641 (1987).

²¹ See generally ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* (1961).

and exclusion momentarily.

Using the exclusionary rule to enforce the Fourth Amendment against the states via the Due Process Clause has been controversial from the moment that *Mapp* was decided. There is little question that it does more than the complete absence of remedy. But it also appears that the police don't think about it that much when events are evolving on the street, especially in low-stakes cases.²² We don't know when and how often the fact that evidence was excluded is communicated back to police officers, and we don't know the extent to which they internalize the cost, rather than chalking it up to soft-on-crime judges and tricky defense lawyers. "In short, we do not know how much the rule deters, either specifically (by deterring those whose searches result in exclusion) or generally (by deterring other officers)."²³

Over time, litigations costs, exceptions and damages valuation problems have hollowed out much of the *Bivens* and § 1983 remedies, leaving them available in the abstract, but realistically unavailable to most people most of the time.²⁴

If the only meaningful remedy available is the exclusionary rule, the feedback loops are so attenuated and distorted as to be deeply suspect. Judges in the vast majority of cases see guilty people trying to enforce their rights, and the officers violating the constitution are too often insulated completely from the outcome.²⁵ Moreover, the courts see such a limited slice of the search spectrum that they cannot calibrate the effects of their actions on the police. We need a mechanism that improves the feedback loops. Police administrators need to be able to talk to the courts regularly about local conditions and the need for particular tactics in light of their experience on the street. Innocent as well as accused citizens need to be able to talk to the courts and the police about the non-investigatory impacts of their actions. These meaningful interactions enhance the legitimacy of all participants.²⁶

Given these concerns, it is clear that we need a low-cost, readily-accessible

²² See *Chuck the Exclusionary Rule*, *supra* note 3; Jacobi, *The Law and Economics of the Exclusionary Rule*, *supra* note 8, at 601 ("[T]he evidence raises doubts that police generally know the law that they are meant to apply, or the consequences of its breach. In addition, those consequences are only tangentially related to police incentives: police performance is measured in terms of arrests, not convictions; some police may value harassing suspects; and police may have an incentive to protect the community from criminals and criminal activity through 'aggressive policing' more than through conducting legal searches.").

²³ *Chuck the Exclusionary Rule*, *supra* note 3 at 369. Thomas Y. Davies, *A Hard Look at What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule: The NIJ Study and Other Studies of "Lost" Arrests*, 1983 AM. B. FOUND. RES. J. 611, 619 (1983) (detailing the difficulties in designing studies that will adequately measure deterrence in terms of foregone illegal searches).

²⁴ See, e.g., *Chuck the Exclusionary Rule*, *supra* note 3 at 385–86.

²⁵ Departments may blame the courts and defense lawyers, not the officer, for the exclusion.

²⁶ There is an extended literature drawing on the role of the courts and citizen participation in the formation of police legitimacy. See generally LEGITIMACY AND CRIMINAL JUSTICE (TOM R. TYLER ed., 2007).

court that is likely to see innocent as well as guilty claimants. To appropriately maintain the commitment to separation of powers, it needs the ability to gather information and appropriately oversee the executive branch, concordant with the separation. It needs the power to grant nominal damages, for their expressive function, and as a means of interacting with the executive while remaining minimally intrusive. This court will create the needed feedback loop, allowing the courts to see the results of their actions on a particular department. Its existence and the defendant's right of access to it will also weigh on the need for exclusion of evidence in particular cases.

III. THE COURT'S CURRENT POSITION

The Supreme Court appears ready to accept a move away from mandatory exclusion in favor of a more graduated response, if there is an effective substitute.²⁷ Or, possibly, without one.²⁸

The exclusionary rule has never been universally popular. There was an outcry when it was enforced against the federal government in *Weeks v. United States*, 232 U.S. 383 (1914), and a steady drumbeat of concern since it was applied to the states in *Mapp v. Ohio*.²⁹ The Justices have been divided since the inception, and scholars have pointed out that over time the Court appears to be moving toward abolition of the mandatory exclusionary rule by a death of a thousand cuts.³⁰ The Court has waxed and waned on the scope of the Fourth Amendment itself, tacking back and forth between property-based and expectation-based conceptions. A strong move toward the deterrence justification for the existence of the rule, coupled with limits on standing and other exceptions, such as inevitable discovery, create room for the courts to avoid the rule in many instances, even where they find a violation.

In some contexts, the Court has found a substantive violation of the Fourth Amendment but did not apply the remedy. In *Hudson v. Michigan*, the majority chose not to apply the rule to minor knock-and-announce violations, given developments in police training and discipline, the expansion of civil remedies, and "the increasing use of various forms of citizen review."³¹ "We cannot assume that exclusion in this context is necessary deterrence simply because we found that

²⁷ But see Donald Dripps, *The Fourth Amendment, the Exclusionary Rule, and the Roberts Court: Normative and Empirical Dimensions of the Over-Deterrence Hypothesis*, 85 CHI.-KENT L. REV. 209, 209 (2010) (predicting that the Supreme Court will not abolish the exclusionary rule, at least with the current remedial mix).

²⁸ Thomas K. Clancy, *The Irrelevancy of the Fourth Amendment in the Roberts Court*, 85 CHI.-KENT L. REV. 191, 202 (2010).

²⁹ 367 U.S. 643 (1961).

³⁰ Clancy, *supra* note 28, at 202.

³¹ 547 U.S. 586, 598–99 (2006) (According to the Court: "Resort to the massive remedy of suppressing evidence of guilt is unjustified.").

it was necessary deterrence in different contexts and long ago. That would be forcing the public today to pay for the sins and inadequacies of a legal regime that existed almost half a century ago.”³²

The Justices are clearly attuned to the legitimacy price the judicial branch pays when the rule is enforced.

Suppression of evidence, however, has always been our last resort, not our first impulse. The exclusionary rule generates “substantial social costs,” which sometimes include setting the guilty free and the dangerous at large. We have therefore been “cautio[us] against expanding” it, and “have repeatedly emphasized that the rule’s ‘costly toll’ upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application.” We have rejected “[i]ndiscriminate application” of the rule, and have held it to be applicable only “where its remedial objectives are thought most efficaciously served,”—that is, “where its deterrence benefits outweigh its ‘substantial social costs.’”³³

The deterrence camp, which supports mandatory exclusion only so long as it has a deterrent effect on law enforcement behavior (measurement problems aside) is contrasted with the “majestic conception” camp, which supports the rule on the basis of some combination of judicial integrity, perceived constitutional commitment and separation of powers.³⁴ According to Professor Thomas Clancy, “[a]t its most fundamental level, *Hudson* called into question the future of the exclusionary rule.”³⁵ He believes that “[a]bolition is Scalia’s clear aim; he has planted the seeds in *Hudson* and needs one more vote to reap the harvest.”³⁶ Even the rule’s defenders have conceded the “majestic conception” and are now defending it in terms of deterrence according to Clancy. “Such grounding cannot indefinitely support the rule’s continued existence.”³⁷ He is right. It is also true that for most of the Fourth Amendment’s history, the mandatory exclusionary rule has not been deemed to apply to the states as a necessary concomitant of Due Process.

Since *Mapp*, the states have lived under a mandatory exclusion regime, at least for some categories of violations, and adapted to it. But at least some portion of the Supreme Court has been engaged in a perpetual conversation since *Mapp* about how to get the right amount of deterrence with the lowest legitimacy hit.³⁸

³² *Id.* at 597.

³³ *Id.* at 591 (internal citations omitted).

³⁴ See Scott E. Sundby and Lucy B. Ricca, *The Majestic and the Mundane: The Two Creation Stories of the Exclusionary Rule*, 43 TEX. TECH L. REV. 391, 394 (2010).

³⁵ Clancy, *supra* note 28, at 204.

³⁶ *Id.*

³⁷ *Id.* at 202–03.

³⁸ Jennifer E. Laurin, *Trawling for Herring: Lessons in Doctrinal Borrowing and*

According to the majority opinion in *Herring*:

To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.” “We do not quarrel with Justice Ginsburg’s claim that “liability for negligence . . . creates an incentive to act with greater care,” and we do not suggest that the exclusion of this evidence could have *no* deterrent effect. But our cases require any deterrence to “be weighed against the ‘substantial social costs exacted by the exclusionary rule,’” and here exclusion is not worth the cost.³⁹

In *Hudson v. Michigan*,⁴⁰ Justice Scalia, writing for a majority of the Court, noted the existence of a broader remedial mix as part of the reason for not applying the rule. He noted the increasing professionalization of the police and the existence of civil enforcement options, as well as Congress’s authorization of attorneys’ fees in civil rights cases.⁴¹

A. Empirical Limitations

While the Court has said that exclusion of reliable evidence is a high price that must be paid only so long as it serves a deterrent function, creating the empirical baselines that allow evaluation of any of the associated claims is incredibly difficult. Trying to determine the extent to which innocent people are routinely searched and/or seized in incidents that do not result in criminal charges is incredibly difficult.⁴² So is trying to determine when officers are deterred by the exclusionary rule from making an illegal search, and when they choose not to perform a legal search.⁴³ These difficulties mean that where the burden is placed

Convergence, 111 COLUM. L. REV. 670, 693 (2011); see also Daniel J. Meltzer, *Detering Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 289 (1988).

³⁹ *Herring v. United States*, 129 S. Ct. 695, 702 at n.4 (2009) (citations omitted).

⁴⁰ 547 U.S. 586 (2006).

⁴¹ Other Justices have embraced a broad role for the state courts and legislatures in fashioning remedies for constitutional violations in other contexts. See, e.g., *Lafler v. Cooper*, 132 S. Ct. 1376, 1389 (2012), acknowledging the feedback loop between the courts and the legislature in crafting remedies for Sixth Amendment violations. (“Principles elaborated over time in decisions of state and federal courts, and in statutes and rules, will serve to give more complete guidance on the exercise of the judge’s discretion.”).

⁴² *Chuck the Exclusionary Rule*, *supra* note 3, at 370–371.

⁴³ *Id.*

may decide the question in advance. If the supporters of exclusion must show that the rule will appreciably deter law enforcement misconduct, they will fail in at least some subset of cases. If the supporters of a non-mandatory rule must show that conditions have changed sufficiently to permit the courts to move away from the rule, they will have similar difficulties. The Court has sidestepped these issues by engaging in an *a priori* analysis of the likelihood of deterrence in classes of cases and basing its decisions on what the Justices believe logic dictates.

We do have some data that shows what happens when a city decides to accept exclusion as the price of doing business, but otherwise ignores the legitimacy of the Fourth Amendment as a limitation in the stop and frisk context. Data from New York City shows that in 2011, nearly 700,000 people, more than 80 percent of them black or Hispanic men, were stopped and frisked by the police department.⁴⁴ Arrests were made in a tiny fraction of cases, and surveys of police reports and video evidence of many of the searches shows that in some fraction the searches are unsupported by reasonable and articulable suspicion. The policy was endorsed by Mayor Michael Bloomberg as a legitimate attempt to keep weapons off the streets.⁴⁵ But it is rare that a city is as candid as New York about a policy of such searches.

Ordinarily, figuring out when individual officers or whole departments simply choose to ignore the rule is more difficult. Surveys of police officers about the frequency of unconstitutional searches do reveal some instances but are thought to under-report the problem.⁴⁶ Sociological research based on ride-along observation and analysis by the observers suffers from a small *n*, but yields important data.⁴⁷ In one of the most interesting studies, researchers from George Mason University rode along with officers from an anonymous police department named "Middleberg."⁴⁸ The researchers observed searches, and talked to the officers involved about their thoughts and motivations behind the search. They then applied existing constitutional law standards to the searches and coded them as legal or illegal. In the study, there were 115 searches, and the coders found 34 to be illegal under then-existing Supreme Court precedent.⁴⁹ (Some would be legal now.)

While the studies were illuminating, Gould and Mastrofski recognize their

⁴⁴ Al Baker, *New York Police Release Data Showing Rise in Number of Stops on Streets*, N.Y. TIMES, May 12, 2012, at A19, available at <http://www.nytimes.com/2012/05/13/nyregion/new-york-police-data-shows-increase-in-stop-and-frisks.html?pagewanted=all>.

⁴⁵ The policy has led to the successful certification of a class-action lawsuit. See *id.*

⁴⁶ *Chuck the Exclusionary Rule*, *supra* note 3, at 370–371.

⁴⁷ Jon B. Gould & Stephen D. Mastrofski, *Suspect Searches: Assessing Police Behavior Under the U.S. Constitution*, 3 CRIMINOLOGY & PUB. POL'Y 315, 324 (2004) (Gould and Mastrofski recognize the limitations of their study: "Only one jurisdiction is represented, the number of searches available for analysis is not large, and the observations lack certain information.").

⁴⁸ *Id.*

⁴⁹ *Id.* at 332.

limitations. They do however draw some tentative conclusions:

[T]hese results suggest that policies designed to increase the visibility of such searches (e.g., requiring officers to document pat downs and other searches, even when no arrest is made) and educating the public more thoroughly about what constitutes a legitimate search might reduce the frequency of improper searches. Future studies of this sort that include good measures of police training and police knowledge of constitutional law on search and seizure will be especially valuable for determining where, when, and how training and education interventions might be most effective.⁵⁰

Different studies place the rate of illegality at very different places. Some commentators place the percentages in the single digits; others extrapolate them to be as high as thirty percent.⁵¹ Deciding exactly what the rate is and how it is affected is important if the alternative remedy has to prove that it produces results as good as the exclusionary rule, assuming that is the standard for an adequate alternative.

So it is not clear what baseline the Court would adopt to decide whether an adequate alternative exists. It is possible that there is a constitutional minimum of deterrence that the alternative must meet. Perhaps it is the replacement value of the rule as currently configured. Perhaps it is simply some amount that is sufficiently more than the zero that went before it to meet the requirements of Due Process. Deciding where that line is, and how it meets the simultaneous concerns of under-deterrence and over-deterrence is daunting.⁵² Professor Tonja Jacobi is unequivocal: “[t]he exclusionary rule creates over-deterrence, which leads to under-enforcement.”⁵³ Professor Donald Dripps is more nuanced, but comes to the opposite conclusion.

The evidence further suggests that, when the opportunity cost for unlawful searches or seizures is low, the current mix is not adequately deterring unlawful police actions governed solely by standards like probable cause and reasonable suspicion. This should concern civil libertarians, but there seems little cause to criticize the current remedial mix for discouraging lawful searches and seizures.⁵⁴

⁵⁰ *Id.* at 346.

⁵¹ Harris, *supra* note 9, at 160 (“Gould and Mastrofski’s work tells us at least two important things. First, non-compliance with Fourth Amendment standards reaches at least thirty percent according to conservative measurements, not the low single-digit levels found in prior studies. And, second, the exclusionary rule as it currently operates would reach almost none of these violations.”).

⁵² See Dripps, *supra* note 27, at 233.

⁵³ See Jacobi, *supra* note 8, at 675.

⁵⁴ Dripps, *supra* note 27, at 233.

B. Legitimacy: A Central Question

The exclusionary rule is at the crossroads of a multi-dimensional legitimacy question. It implicates the legitimacy of the police as viewed by the public; the police, as viewed by the courts; the courts, as viewed by the public; and the courts, as viewed by the police. The rule is necessary, some believe, to enhance the legitimacy of courts, because it keeps them from becoming involved in the illegal behavior of officers.⁵⁵ But excluding probative evidence undercuts the courts' legitimacy from the perspective of those who believe the institution's principal goal should be a quest for the truth.

Discussions *ex ante* about legitimacy are likely to be the product of our own intuitions and attitudes more than anything else. We do know from the procedural justice literature that these views matter. "Knowing what is experienced by members of the public as fair or unfair is key to developing and maintaining public views that the legal system is legitimate."⁵⁶

We know from surveys and longitudinal studies that those attitudes are informed in large part by treatment by the police. "[L]egitimacy increases following personal experience with the police among both those with favorable and unfavorable outcomes, as long as those involved feel that the procedures used by the police were fair."⁵⁷ Similar studies show that the courts will also be held to accountable for their actions.⁵⁸

The cost of the exclusionary rule must also be accounted for in terms of judicial legitimacy—when evidence is excluded, judges are seen as engaging in behavior other than a quest for the truth, and I would expect that while lawyers are ready to think about the other important roles the court plays as part of an overall system, the lay public is not.

In the stop-and-frisk context, for example, there is a genuine question of the legitimacy of the courts' intervention in on-the-street policing behavior, both as seen by law enforcement officers and as seen by the general public.⁵⁹ The courts' capacity to define and adjudicate reasonable police conduct is distorted by case and controversy limitations, and the absence of street-level expertise. Some

⁵⁵ See, e.g., Clancy, *supra* note 28, at 202.

⁵⁶ Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 OHIO ST. J. CRIM. L. 231, 264 (2008).

⁵⁷ *Id.* at 265.

⁵⁸ For an excellent discussion of the variables that affect the Court's legitimacy as a rulemaker in the Fourth Amendment context, see Donald A. Dripps, *The Fourth Amendment and the Fallacy of Composition: Determinacy Versus Legitimacy in a Regime of Bright-Line Rules*, 74 MISS. L.J. 341, 342 (2004) [hereinafter *Determinacy v. Legitimacy*] ("Fourth Amendment determinacy, with the attendant need for bright-line rules, stands in serious tension with Fourth Amendment legitimacy—the need to base the content of the bright-line rules on conventional sources of constitutional law rather than the personal preferences of judges who happen to be in the majority in any given case.").

⁵⁹ See Myers II, *supra* note 16, at 945.

commentators and jurists believe they are actually helping the police with the exclusionary rule. They believe that the police will certainly enhance their legitimacy by respecting the limits—however malleable and uncertain—laid down by the Fourth Amendment, and that the rule is the only available tool that the courts have to prod the police toward behavior that will ultimately redound to their benefit. The courts simultaneously undermine their legitimacy with the police and other members of the public by using the exclusionary rule to benefit guilty defendants, when they allow the guilty person to go free because the “constable has blundered.”⁶⁰ Add in the Court’s determination to hew to an objective inquiry, rather than a subjective inquiry—i.e. refusing to determine if the officer is well-meaning and trying to do her job within the constraints of the Constitution or a deliberate violator gaming the system for purposes secondary to the suspect’s guilt or innocence—and the knot approaches Gordian proportions.⁶¹

We pay a different price for the exclusionary rule as well: reduced perceptions of the legitimacy of the underlying right.⁶² Critics have pointed out repeatedly that it seems unfair that “the criminal go free because the constable has blundered.”⁶³ The assumption underlying the term blunder of course is that the constable is trying to follow the law. The Court’s Fourth Amendment precedents are complicated, hard to parse, and the product of different majorities, with different values, writing at different times, with different underlying beliefs about the legal theories that underlie the amendment. Legal scholars debate the parameters at great length. It is no surprise that even officers acting in the best of good faith can draw the lines inaccurately when trying to follow the law.

The courts are fully aware of these factors. One response is undermining the scope of the substantive Fourth Amendment protection to keep evidence from being excluded. As Judge Guido Calabresi said:

Judges—politicians’ claims to the contrary notwithstanding—are not in the business of letting people out on technicalities. If anything, judges are *in* the business of keeping people who are guilty in on technicalities [T]he judge facing a clearly guilty murderer or rapist [claiming a Fourth Amendment violation] will do her best to protect the

⁶⁰ See, e.g., Daniel E. Lungren, *Victims and the Exclusionary Rule*, 19 HARV. J.L. & PUB. POL’Y 695, 695–97 (1996).

⁶¹ See *Whren v. United States*, 517 U.S. 806, 810, 812, 813 (1996) (“Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.”).

⁶² See *Dripps, Determinacy v. Legitimacy*, *supra* note 59 at 350 (citing John Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1037 (1974)) (“[S]uppression ‘rubs our noses’ in the fact that limiting police authority necessarily enables dangerous wrongdoers to escape their just deserts.”).

⁶³ The formulation was first offered by then-Judge Cardozo, while serving on the Court of Appeals of New York: “There has been no blinking the consequences. The criminal is to go free because the constable has blundered.” *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926), *cert denied*, 270 U.S. 465, 489–90 (1926).

fundamental right *and* still keep the defendant in jail This means that in any close case, a judge will decide that the search, the seizure, or the invasion of privacy was reasonable. That case then becomes the precedent for the next case. The next close case comes up and the precedent is applied: same thing, same thumb on the scale, same decision [C]ourts [thus] keep expanding what is deemed a reasonable search or seizure.⁶⁴

We need a new range of remedies because, to an important segment of the populace, the exclusionary rule clearly benefits the guilty, while providing such an attenuated benefit to the innocent in the form of deterrence that it extracts a high price from the system in terms of perceived legitimacy. The other litigative remedies are so expensive that they are essentially unavailable to most of the people most of the time, unless a department so loses sight of the Fourth Amendment that a § 1983 class-action suit makes sense.⁶⁵ A meaningful small claims remedy will restore the oversight of the police that is essential to public perceptions of the officers' legitimacy, move the oversight function from the highly-attenuated litigation of criminal trials to specialized proceedings where the central and deciding question is police compliance with the Constitution, and create a meaningful feedback loop between departments and the oversight body.

C. The Endowment Effect and Differential Legitimacy Effects Between Ex Ante and Ex Post Solutions

As many have noted, the problem some posit with the exclusionary rule is a price in foregone searches. In such cases, the cost comes not from the operation of the exclusionary rule but from the Fourth Amendment.⁶⁶ But, in my view, it is not quite that simple. Building a system around an exclusion remedy is guaranteed to cause legitimacy problems in at least a subset of cases, where one built around damages will not. If the only method for gaining compliance is the exclusionary rule, then in at least some cases, evidence must be excluded for the courts to have any effect on police behavior. And this means that in those cases, the courts have to spend their legitimacy as a truth-finding institution to purchase police compliance. We should expect the courts to be willing to value that legitimacy differently.

And my intuition is that the public should be expected to value the legitimacy of the institutions differently, because they have different core jobs. Keeping

⁶⁴ See Calabresi, *supra* note 12, at 112 (in an article advocating reduction in sentences for defendants as an alternative to outright exclusion.).

⁶⁵ These cases are far more successful in the excessive force arena, rather than the search and seizure arena. See Marc L. Miller & Ronald F. Wright, *Secret Police and the Mysterious Case of the Missing Tort Claims*, 52 BUFF. L. REV. 757, 766–67 (2004).

⁶⁶ Amar, *supra* note 5, at 793–94 (internal citations omitted).

evidence out of a trial interferes with the court's core job—the quest for truth—more than it interferes with the police's core job: identifying and apprehending offenders. Moreover, there is an intermediary between the two jobs, the prosecutor, who is responsible for keeping the evidence admissible.

But perhaps the biggest reason we should expect a difference in perceived legitimacy between exactly the same degree of Fourth Amendment compliance purchased through exclusion and compliance purchased through *ex ante* incentives is the endowment effect.⁶⁷ Behavioral economists have proven repeatedly that giving up something that you already have is more painful psychologically than foregoing the chance to buy that same thing at an identical price. In fact, people value things they own more than they would value exactly the same item if it were for sale on the open market—*because* they own it.

Given the bounded rationality of human beings, it is perhaps not surprising that a citizen will differentially value evidence that has already been seized and the lost opportunity *ex ante*. The combination of the endowment effect and loss aversion would be expected to make the public—who determine the legitimacy of the court's choice of sanction—more critical of the courts when they are excluding evidence that is already in the hands of the police. First, the potential evidentiary value of each foregone search must be discounted by the degree of likelihood it will result in evidence of a crime. If there is clearly going to be evidence, then the officer already has probable cause, and can get a warrant. A lost chance to engage in an illegal search on the basis of *ex ante* knowledge that is less than probable cause is going to be felt as a lower price than the exclusion of evidence that has been acquired. This is especially true once it is understood as part of a complex of values that trade-off between security and privacy. A system that truly limits the right to search for evidence in the first place will have a lower perceived cost than a system that takes that evidence back after an illegal search. To use a game show example, choosing not to open door number three and walk away with a smaller prize is an entirely different emotional event than being told after you open door number three and find the million dollars that you cannot have it, and must walk away with the consolation prize instead. *Ex post* and *ex ante* sanctions are materially different.

D. Other Solutions—Civil Tort Claims, 42 U.S.C. § 1983 Actions and Bivens Actions

Under my proposal, other existing solutions would remain part of the remedial mix. Civil tort claims, federal civil rights actions under 42 U.S.C. § 1983, and *Bivens* actions against federal agents would all remain in place. The

⁶⁷ This is referred to in the behavioral economics as loss aversion. For a sophisticated but accessible discussion, see Nathan Novemsky and Daniel Kahneman, *The Boundaries of Loss Aversion*, 43 J. MARKETING RES. 119 (2005) (describing the phenomenon and explaining some of the factors that affect it).

procedural difficulties with such actions are well-documented.⁶⁸ Getting a grip on how many such actions there are and how often they are successful is also extremely difficult. While some bemoan the absence of § 1983 actions as a successful remedy, others suggest that there is a significant amount of civil work being done, but that the nature of settlements is deliberately hidden by the police as a part of a strategy of cost-containment. “[I]ndirect evidence, in the form of newspaper reports of monies paid out by cities, counties and police departments for such lawsuits and settlements, and a few studies of aggregate court data, suggesting a fair number of claims against police under 42 U.S.C. § 1983.”⁶⁹ Professor Dripps theorizes that many of the sealed settlements involve police brutality—cases where the provable damages will be high.⁷⁰ If Dripps is correct, and I suspect he is, these data are not a representative sample of unreasonable searches.

Constitutional class actions suffer from all of the problems of other class action suits. Aggregating claims to make them worthwhile for civil rights lawyers is costly, quantifying and proving damages is difficult, and very often the plaintiffs are otherwise unsympathetic.⁷¹ We are dealing with an array of largely inchoate harms, and even Judge Posner chose to limit his economic analysis of the problem to harms such as property damage and lost time.⁷² Qualified immunity makes many of the harms unreachable.⁷³

Bivens actions are named for the case that decided that there should be a federal equivalent of 42 U.S.C. § 1983, which created a right to sue the states for violations of constitutional rights that took place under color of state law.⁷⁴ In *Bivens* itself, Chief Justice Burger dissented from the judicial creation of a civil remedy for federal violations of individuals’ constitutional rights.⁷⁵ He believed that the implied remedy the majority fashioned violated separation of powers, but also believed that the historical record showed that the exclusionary rule was

⁶⁸ See, e.g., Amar, *supra* note 5, at 811–16; Eisenberg & Schwab, *supra* note 20, at 645–47; Schroeder, *supra* note 20, at 1385–92.

⁶⁹ See Miller & Wright, *supra* note 63, at 775.

⁷⁰ See Dripps, *supra* note 27, at 214.

⁷¹ See, e.g., Donald Dripps, *Beyond the Warren Court and its Conservative Critics: Toward a Unified Theory of Constitutional Criminal Procedure*, 23 U. MICH. J.L. REFORM 591, 629 (1990) (noting the “two obvious reasons for the failure of civil plaintiffs to enforce the fourth amendment: first, juries sympathize with the police and not with criminals; second, search and seizure activity, however unconstitutional, ordinarily does not cause the kind of actual damages that our tort system compensates”). See also Richard A. Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49 (1981); Richard A. Posner, *Excessive Sanctions for Governmental Misconduct in Criminal Cases*, 57 WASH. L. REV. 635, 638–641 (1982) [hereinafter *Excessive Sanctions*].

⁷² *Excessive Sanctions*, *supra* note 72 at 638–639.

⁷³ See *Chuck the Exclusionary Rule*, *supra* note 3 at 385–386.

⁷⁴ *Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

⁷⁵ See *id.* at 411 (Burger, C.J., dissenting).

failing to achieve the Court's stated goals.⁷⁶ In particular, he was concerned that the exclusionary rule undermined the justice system, while leaving innocent parties without a remedy in the majority of cases.⁷⁷ "Congress should develop an administrative or quasi-judicial remedy against the government itself to afford compensation and restitution for persons whose Fourth Amendment rights have been violated."⁷⁸

E. Educational Justifications—the Importance of the Feedback Loop

Professor Scott Sundby has advanced an important rationale that supports the process of the *hearing*, independent of the suppression of the evidence.⁷⁹ The educational value for police officers, who are otherwise subject to internal biases, has to be considered when weighing the costs and benefits of the exclusionary rule.⁸⁰ He points to *Mapp*'s benefits in forcing process as being as important as the judicial integrity benefits that come from excluding evidence. "By making suppression hearings necessary, therefore, the exclusionary rule provided a forum through which the importance and substance of the Fourth Amendment is reaffirmed on a daily basis in city and county courthouses across the nation."⁸¹ Professor Sundby is right. The benefits he details are about the process of explaining decisions, and the feedback loop between citizen, judge and police officer. Neither of those is integrally connected to the remedy of exclusion.

Instead, the system depends on accused criminals seeking exclusion of relevant evidence because that is the cadre of motivated individuals—with access to state-paid attorneys—who will develop the Fourth Amendment doctrinally. This leads to significant skewing of the scope of the right in favor of the state. Judges are, quite understandably, reluctant to suppress compelling evidence of guilt, and a quilt of exceptions has grown up over time that insulates many police decisions from exclusion. If the stakes were different, the substantive outcomes for Fourth Amendment doctrine would probably be different, too.

A longstanding response to critics of exclusion has been that the cost of lost convictions is attributable not to the exclusionary remedy, but to the underlying Fourth Amendment right.⁸² This is true. But lost convictions are not the only cost that flows from the exclusionary rule. Another cost is the sense that the courts are substituting attention to "technicalities" brought to them by the guilty for the quest

⁷⁶ See *id.* at 411–413.

⁷⁷ See *id.* at 416–417.

⁷⁸ *Id.* at 422.

⁷⁹ Sundby, *supra* note 5, at 258–59.

⁸⁰ *Id.*

⁸¹ *Id.* at 257.

⁸² Donald A. Dripps, *The "New" Exclusionary Rule Debate: From "Still Preoccupied with 1985" to "Virtual Deterrence"*, 37 FORDHAM URB. L.J. 743, 750 (2010) [hereinafter *The New Exclusionary Rule Debate*].

for the truth, and are doing so in a way that perverts, rather than pursues justice.⁸³ An adequate deterrent may in fact reduce the access to the evidence by stopping the police from committing the violation in the first instance. But being unable to access evidence that proves that the defendant committed the crime is different than accessing it and then ignoring it. Defending the rights of a possibly guilty (or innocent) person is materially different than defending the rights of a definitely guilty person.

Dripps is right when he asserts: “A judiciary that wanted to eliminate the exclusionary rule without encouraging violations of the Constitution would not do so *de jure*, but *de facto*, by crafting effective alternative remedies that make exclusion too rare to care about.”⁸⁴ But it is not clear to everyone that the courts have the authority to legitimately price violations and use fines to administer the police. The proposal proffered here would ask the legislature to create that power explicitly for the courts, enhancing their legitimacy as a consequence.

Difficulties arise in borderline cases, where the mere fact that the constable blundered seems an inadequate reason to set the criminal free. One suspects that many courts in many places strain to avoid that result. Yet it is precisely in the context of the borderline mistake, the everyday close call that should have been made differently, that alternative remedies are hardest to find. Money damages will not lie when a reasonable officer could have believed that the search was legal. And any attempt to extend damages liability to the case of borderline error runs headlong into the judicial rationale for qualified immunity. In no other context is the problem of overdeterrence—more precisely, the problem of unintended deterrence of legitimate acts—more keenly felt.⁸⁵

In most cases, therefore, the remedy is suppression or nothing. The lack of an effective alternative remedy under current law makes attacks on the exclusionary rule harder to justify and requires that something be put in its place.

IV. THE PROPOSAL

Whether or not the exclusionary rule enhances or undercuts the legitimacy of the courts is an open question, and the answer depends not so much on the law, but

⁸³ See, e.g., Amar, *supra* note 5, at 20 (calling exclusion an “awkward and embarrassing remedy” because it suppresses reliable evidence of guilt); Calabresi, *supra* note 12, at 111 (describing the exclusionary rule as a litmus test, which appeals to liberals, but “[t]o conservatives, it is an absurd rule through which manifestly dangerous criminals are let out because the courts prefer technicalities to truth”).

⁸⁴ *The New Exclusionary Rule Debate*, *supra* note 83, at 790.

⁸⁵ See John C. Jeffries, Jr. and George A. Rutherglen, *Structural Reform, Revisited*, 95 CALIF. L. REV. 1387, 1407–08 (2007).

on the values of the person giving the answer.⁸⁶ Therefore the question itself is insoluble as a matter of some irrefutable principle—some portion of the public will be alienated by either choice and both points of view believe they have the better conceptual position. Neither is it easily resolved by empirics, given the challenges noted above. The constitutional commitment is itself open-textured—the Fourth Amendment does not ban all searches, it requires them to be reasonable.⁸⁷ With these parameters, leaving room for the states to experiment with methods designed to enhance the legitimacy of the police and the courts makes sense.⁸⁸ As Professor Vermeule has stated, “Judges should . . . defer to legislatures on the interpretation of constitutional texts that are ambiguous, can be read at multiple levels of generality, or embody aspirational norms whose content changes over time with shifting public values.”⁸⁹ According to Vermeule, due process under the 14th Amendment is precisely one of these areas. “In general, . . . courts should adopt an unassuming and unambitious posture, deferring to other institutions whenever the legal materials at hand do not clearly and specifically resolve the legal questions.”⁹⁰

This means that there is room doctrinally for the experiment under the Court’s precedents, and in my view, such an approach is theoretically sound as well.⁹¹

Therefore, the following first proposal is offered.

A. *The Mechanics of the Proposal*

The mechanics of this proposal are designed around the incremental effects of small changes. It takes the deterrence/cost-benefit position of the current Court as a given, and tries to conceive a state adopting an administrative regime with low liquidated damages and extremely limited procedural rights, but one designed to leverage current technology to make it easy for the innocent to assert that their constitutional rights had been violated. Legislatures might be convinced to try it in exchange for a partial rollback of the mandatory exclusionary rule, limiting exclusion to those cases where the government culpably violated the Fourth Amendment. It proposes inquisitorial rather than adversarial enforcement, and

⁸⁶ For an excellent discussion of the differing views, see Scott E. Sundby and Lucy B. Ricca, *The Majestic and the Mundane: The Two Creation Stories of the Exclusionary Rule*, 43 TEX. TECH L. REV. 391 (2010).

⁸⁷ See U.S. CONST. amend. IV. (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .”).

⁸⁸ ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY* 230 (2006).

⁸⁹ *Id.*

⁹⁰ *Id.* at 231.

⁹¹ See generally Herbert L. Packer, *The Courts, the Police, and the Rest of Us*, 57 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 238, 240 (1966) (“[T]he rules of the criminal process, which ought to be the subject of flexible inquiry and adjustment by law-making bodies having the institutional capacity to deal with them, are evolved through a process that its warmest defenders recognize as to some extent awkward and inept . . .”).

tries to imagine the impact of body-worn video and the web on the problems of cost and testifying.⁹²

Police departments across the U.S. are in the process of adopting and issuing body-worn video devices, which create digital video records of police-citizen interactions.⁹³ This development, which I believe will accelerate over time, is one of the keys to making the proposal work in its current form. This section will address the creation of the forum and how it differs from the current system, consider issues of initiation and proof, and discuss how the proposal will create new remedies and affect existing ones.

1. The Forum

The new range of cases would be heard by judges trained to investigate and adjudicate constitutional small claims. The judges would be selected in the way that judges are normally chosen in the jurisdiction—election or appointment. They would become members of the judicial branch. Those appointing such judges would have to be attuned to the legitimacy effects of selecting people too strongly identified with the defense bar or with law enforcement. (Electability, of course, is its own separate inquiry.) The forum would operate with limited procedural rights and relaxed rules of evidence, much as small claims court does in the mine-run of civil cases. The judges would be asked to adopt an inquisitorial mindset, supplementing the pleadings of the citizen and the department with court-initiated inquiries and subpoenas for physical evidence. Over time, some form of rotation or role-sharing would probably be important to avoid the risks of institutional capture, but there is always a tradeoff between specialized expertise and representativeness.

2. Initiation of Actions

Citizens would opt into the ALJ system by filling out a form, available at the department or on the internet, waiving the right to counsel and to the evidentiary rules and turning the matter over to the judge for binding decision. The department and not the officer would be the party in interest, under my proposal. (For cases where the citizen was not charged, this filing could take place very promptly, when it was most likely to be fresh in the participants' minds.)

⁹² For an extended discussion of the “testilying” phenomenon, see Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037, *passim* (1996) (describing the widespread police practice of deliberately lying to the court, sometimes with the court’s willingness to believe the incredible, when the product of the lies is what the officers consider substantial justice).

⁹³ For a more extended discussion of the emergence of body-worn video, see Richard E. Myers II, *Challenges to Terry for the Twenty-First Century*, 81 MISS. L.J. 937 (2012) (examining the emergence and policy implications of body-worn video); Harris, *supra* note 9, at 166 (2009) (extensive discussion of the same).

Sovereign immunity would be waived in advance for cases amenable to resolution in the specialized court. The department rather than the officer is chosen to avoid some of the risks of over-deterrence, and the department is in a position to select and screen officers, and to discipline them. Giving the department financial responsibility will enhance the oversight incentives.

3. Proving Cases

The judge would operate as both an investigator and finder of fact. The citizen would be expected to detail the time, date and place of her interaction with law enforcement, and state briefly and in plain language what happened from her point of view. She would recount what she remembered from what was said. A form would also be posted prompting the recounting of important information, such as requests for permission, statements by the officer and the citizen, and the presence of witnesses to the event. The police officer would be permitted to fill out a similar form providing additional detail about the incident. The judge would subpoena any digital video of the event, which the department would be required to preserve and provide. The judge would decide on the pleadings and the digital video, if sufficient, or could call witnesses. The right to confrontation would be sharply limited, and the decision could be issued with or without further hearing. Cases where the expected video or other evidence was inexcusably missing would be decided against the government, as far as the fine went, and the criminal court would retain the option of excluding evidence as well.⁹⁴ In cases decided without hearing, the court would issue a tentative written ruling, with proposed findings of fact, and seek final input from parties. In the event that the parties supplemented the record, the court would seek additional input as appropriate and issue a final ruling.

4. Remedies

The most significant legal innovation would be the establishment of a liquidated damages regime. The amount should be non-trivial, and come directly from the police department's budget. I suspect that the amount required to effect change might be fairly low (e.g. \$100), although it is difficult to tell in advance.

As Professor Dripps notes:

The difficulty in applying the optimal-deterrence prescription to search-and-seizure is that there is no symmetry between the gains the regulated actors secure from violations and the cost of those violations Typically, however, exclusion operates in cases where damage actions face formidable valuation problems. We

⁹⁴ The absence of video in such cases would of course go to the weight of the evidence in the government's substantive case as well.

can perhaps estimate the employer's benefit from the government's willingness to pay tens of thousands per year to incarcerate the guilty and the added expense of the police force itself. Any such calculation will typically dwarf the economic damage from unlawful stops, searches, and even arrests. Guessing about liquidated damages runs the risk of over-deterrence.⁹⁵

Given those difficulties, the system would be best served by a regime that allows room for experimentation, and for some local control over the optimal balance of deterrence above the constitutionally-mandated floor. The political branches and the courts in consultation would be able to adjust the liquidated damages schedule based on collective experience. I would recommend setting the fine to the department and payment to the citizen at \$100 per violation for stop and frisk violations and \$1,000 for search warrant violations, plus compensatory damages of up to \$3,000 for proven losses. This would cover things like property damage, transportation costs in the event of wrongful arrest, etc. The department would also require the violating officer or officers and the police chief to jointly sign a letter of apology to the citizen. The amounts are set deliberately low not to adequately price the harm, but to create a starting point for entry into the system of the uncompensated victims. Right now, transaction costs keep the vast majority of such cases entirely uncompensated. Because much of the harm is dignitary and largely immeasurable, acknowledgment of the wrong and apology by the offending parties will create a dignitary and largely immeasurable remedy.⁹⁶

I recognize that pricing constitutional violations is always controversial.⁹⁷ For some, no price will ever be high enough because they see pricing as condoning the action as legal once the government is willing to pay that price. The argument is that pricing creates an incentive to violate, but that is not necessarily true if the exclusionary remedy remains available for deliberate violations or for a department that has a policy of tolerating such violations. The current framework used by § 1983 plaintiffs to decide such questions would be very useful to the judges here.

5. Appeal to District Court

I would propose that either party be permitted to appeal an unfavorable decision to the court of record in the state. In the event that the state appealed, it would have to provide counsel to the citizen. The local publicly-paid defenders

⁹⁵ See Dripps, *supra* note 27, at 215–16.

⁹⁶ See, e.g., ALFRED L. BROPHY, REPARATIONS PRO & CON, 7–18 (2006) (discussing reparations, apologies and truth commission); Andrew E. Taslitz, *The Criminal Republic: Democratic Breakdown as a Cause of Mass Incarceration*, 9 OHIO ST. J. CRIM. L. 133, 171–73 (2011) (discussing restorative justice and participation).

⁹⁷ See generally *Excessive Sanctions*, *supra* note 72, *passim*; Jacobi, *supra* note 6, *passim*; Saul Levmore & William J. Stuntz, *Remedies and Incentives in Private and Public Law: A Comparative Essay*, 1990 WIS. L. REV. 483, 490 (1990).

office would have the necessary local knowledge and expertise to provide such a service, and an institutional interest in participating as well. The role of the specialized court in creating law would be expected to have spillover effects. Especially as to the substantive Fourth Amendment scope, I would expect the court to slowly expand the scope of the protections available to parties seeking civil remedies, because they would not be faced with spending the court's legitimacy on exclusion of probative evidence of criminal guilt.

6. Residual Exclusionary Rule

In the event that there was a criminal case arising out of the search, the defendant or the state could remove the claim to the judge hearing the criminal case to get a single finding.⁹⁸ Finding of suppression would yield the same \$100 payment. The courts in criminal cases would be expected to have access to the same information, and to have access to the same range of liquidated damages remedies. Here is the tradeoff for the law and order politicians: to find suppression, the proposal would change the nature of the inquiry to require an actual finding of fault. Willful or grossly negligent violations in such cases would still be subject to the exclusionary rule. Negligent violations would not. According to the Supreme Court in *Herring*, this is descriptive, not prescriptive, i.e. it works no serious substantive change in the underlying inquiry.

To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.⁹⁹

Whether that summary fairly characterizes the cases coming before it is certainly the subject of debate, even among the Justices.¹⁰⁰ Some precedents that have resulted in exclusion would certainly make less sense in such a regime, and the state or locality would essentially be seeking dispensation from the Court by pointing to the new remedial mix and the deterrent effect it creates. Bad faith is also awkwardly juxtaposed to the objective inquiry requirements from the pretext

⁹⁸ Because Fifth Amendment protections would not apply when the defendant was a party in the civil liquidated damages case, one would expect this to almost always result. The courts have limited the later admissibility of statements made in suppression hearings, for policy reasons.

⁹⁹ See *Herring v. United States*, 129 S. Ct. 695, 702 (2009).

¹⁰⁰ This was certainly not the view of the majority in *Brewer v. Williams*, 430 U.S. 387 (1977) where a 5-4 court divided on the use of the exclusionary rule in a Fifth Amendment case. There may be different conceptual thresholds depending on the source of the right, because the text of the Fifth Amendment mandates exclusion. It may be more useful to think of exclusionary rules, rather than a unified exclusionary rule.

cases such as *Whren*, where the Court explicitly disavowed inquiry into the subjective mindset of the officer conducting a stop.¹⁰¹

There is ample precedent for courts engaging in sorting among substantive violations to choose when to apply an exclusionary remedy. In the common-law system, this is the English and Canadian model.¹⁰²

7. Residual Federal Remedy

Note that the proposal is for a state or locality to adopt the new remedy. The substantive law of the Fourth Amendment would remain subject to the uniform federal floor. Also, under the proposal, the remedies available under § 1983 would still apply. Given their inherent limitations, I would expect § 1983 actions to be used only where damages are higher. The federal exclusionary rule would remain available on habeas as well. The federal courts would be required under existing federal precedent to take the remedial mix in place in a state into consideration when determining if the new remedy is adequate.

8. Reward Pool for Police to Create Institutional Culture

The final innovation would be to reward the police for compliance. The police departments should receive funds to establish a departmental incentives pool, from which the expected fines for non-compliance would be drawn. If the police exceed expectations, the pool would be divided among all of the officers on the department in the form of a year-end bonus. That way every officer who violated the rule would not only be costing the department money, he would be taking money out of the pockets of his fellow officers, who would not receive their prorated share of the compliance bonus. In a fifty-officer department, every violation found to have been committed by an officer would not only require the department to pay \$100 to the affected citizen, it would literally take two dollars out of the pocket of every officer in the department.

9. Fiscal Considerations

Agreeing to pay the liquidated damages in advance will expose the localities to new costs. And the reward pool idea would make it a fixed, not contingent cost, which the taxpayers would have to agree to. Putting money into such a pool would be a demonstrated commitment by the political leadership of the state or municipality that the police should follow, not skirt, the Fourth Amendment. And

¹⁰¹ *Whren v. United States*, 517 U.S. 806 (1996).

¹⁰² The balancing approach is generally used in West Germany and other European countries. See, e.g., Craig M. Bradley, *The Exclusionary Rule in Germany*, 96 HARV. L. REV. 1032, 1033 n.5, 1035 (1983). But see generally Yale Kamisar, "Comparative Reprehensibility" and the Fourth Amendment Exclusionary Rule, 86 MICH. L. REV. 1 (1987) (criticizing balancing approach).

if there is an external good-government group that values privacy more than the average individual, they could fund that pool to increase the incentives. This opportunity to provide direct funding of the objective might have a stronger appeal to donors than the more attenuated funding that goes into non-profits that litigate these issues. There is some precedent for municipalities being willing to fund this category of values in the form of civilian oversight boards. Cities such as Cincinnati, where there are deep historical political divisions over the legitimacy of the police department,¹⁰³ or New York, where the police department admittedly engages in aggressive stop and frisk behavior, much of which is likely unconstitutional, may be able to rehabilitate the public image of the police by going to an outside oversight mechanism.¹⁰⁴ Driving the cases into locally controlled systems will also have the potential to limit the potentially much larger and more unpredictable awards that come in § 1983 actions. Localities could use the systems to engage in oversight, limiting violations.

Independent of the effects on the exclusionary rule, I would support adoption of this liquidated damages small claims system, because it will make it more likely that innocent parties would participate in the system to vindicate their rights, and increase the opportunities for police and citizens to negotiate expectations regarding appropriate police conduct. These negotiated expectations should lead to increased legitimacy of the police.¹⁰⁵ This proposal should also meet the constitutional requirements for an alternative to the exclusionary rule. By moving the definition of Fourth Amendment rights out of the realm of defendants seeking to suppress evidence or expensive § 1983 litigation, the proposed system would also meet the stated goals for an alternative to exclusion—making remedies for Fourth Amendment violations readily available to the rich and poor, guilty and innocent.

¹⁰³ See Greg Ridgeway, CINCINNATI POLICE DEPARTMENT TRAFFIC STOPS, APPLYING RAND'S FRAMEWORK TO ANALYZE RACIAL DISPARITIES, (2009) at xi, 1–2, *available at* http://www.rand.org/content/dam/rand/pubs/monographs/2009/RAND_MG914.pdf (describing memorandum of agreement between the U.S. Department of Justice and the Cincinnati Police Department attempting to resolve citizen complaints and a separate “collaborative agreement” designed to “attempt to resolve social conflict, improve community-police relations, reduce crime and disorder, and resolve pending individual and organizational legal claims about racially biased policing in Cincinnati”).

¹⁰⁴ See Jim Dwyer, *Protesting Police Tactic, In Silence*, N.Y. TIMES, Jun. 14, 2012, at A21. (“In 2011, the police recorded making stops of 685,000 people, a vast majority of them black and Latino young men, and more than 96 percent of them released without a charge.”).

¹⁰⁵ See TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW, ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS 7–18 (2002) (explaining that legitimacy is enhanced when members of the public believe that the police and courts are following fair processes); Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCHOL. 375 (2006) (same).

B. Anticipated Criticisms

This symposium is an addition to an extended debate about the value and future of the exclusionary rule. Some commentators believe that the mandatory exclusionary rule not only correctly allocates authority among the branches, but also arrives at the proper balance over time.¹⁰⁶ With it in place, the police are free to continue to provide law and order functions without fear of excessive punishment, and the Fourth Amendment we get is the Fourth Amendment we want.

We have the exclusionary rule not because it is a necessary remedy for Fourth Amendment violations, but because it is the possible remedy with the least combined risk of under-deterrence and over-deterrence. Many remedies, like liquidated punitive damages, could deter (and satisfy other remedial objectives such as judicial integrity), but only at the risk of overdeterrence. Other remedies can be modified to avoid overdeterrence, but only by making them toothless (the immunity defense to tort suits is illustrative).¹⁰⁷

Others believe that the police will remain impervious to pricing, and politics make it unlikely that the legislature will get involved in any way that might be seen as “soft on crime.” “Because government actors respond to political, not market, incentives, we should not assume that government will internalize social costs just because it is forced to make a budgetary outlay.”¹⁰⁸

Departments typically do not internalize the costs of damages awards.¹⁰⁹ It is this insulation in the form of externalized costs that makes the critics skeptical. “Thus, the idea that those in charge of a police department will respond at some point to the fiscal pain of escalating damages for police misconduct by imposing meaningful reforms has no basis in fact.”¹¹⁰

These criticisms are powerful, and require serious thought. This essay does not completely address them, but is intended instead as a first step in a broader discussion.

¹⁰⁶ See, e.g., *The New Exclusionary Rule Debate*, *supra* note 83, at 790.

¹⁰⁷ *Id.*

¹⁰⁸ Daryl Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 347 (2000).

¹⁰⁹ Harris, *supra* note 9, at 157.

¹¹⁰ *Id.* at 156.

C. Is the Game Worth the Candle?

Notwithstanding the criticisms, in this case I think the game is worth the candle, in part because the price of the experiment is fairly low, especially for localities that have already adopted body-worn video for the police. It avoids potentially costly litigation by providing an alternative with fixed costs and damages, and fits comfortably within the existing constitutional framework.

It should also pay results in enhanced legitimacy and compliance simply by retraining otherwise law-abiding officers, and by closing the deeply attenuated feedback loop. Recall the Gould and Mastrofski study. Considering the small *n* involved, it is important to note that a very significant portion of the observed violations, nine of a total of thirty-four, came from one officer. To be clear, a single officer accounted for more than one-fourth of the illegal searches observed by the study. That officer was also described as a Dudley Do-Right.¹¹¹ The study showed that forty-one percent of the illegal searches (fourteen out of thirty-four) were performed by fewer than five percent of the officers (two of forty-four). Take those two officers off the force, or, given that they were described as basically law-abiding, retrain them so that they follow constitutional procedures, and the numbers are dramatically altered for the department. At that point, assuming that their replacements would have made the same number of legal searches, the results would be that 20 out of 101 searches were illegal, still problematic, but a dramatic improvement.

Note that the changes are incremental. I am not proposing doing away with exclusion altogether—only with making exclusion non-mandatory.¹¹² If Clancy is right and the Court is poised to axe exclusion entirely, then liberals should be happy to get half a loaf. However, I believe Dripps is essentially correct—the courts need exclusion as part of their remedial arsenal, and are unlikely to disarm unilaterally.¹¹³ Moreover, separation of powers suggests that they need not, and

¹¹¹ Gould and Mastrofski, *supra* note 45, at 345 (“Another officer, who singlehandedly accounted for the most illegal searches, was also one of the most articulate, low-key officers observed. He frequently made small jokes with the suspects he searched, made small talk, and was always very polite. Indeed, what makes these findings so troubling is that, but for their proclivity to search illegally, these patrolmen might be considered model officers. They were “Dudley Do-Rights” who did wrong, but in the war against-drugs context, their unconstitutional searches were viewed as normal and necessary, virtually unchallenged by the police hierarchy, the courts, or the public.”).

¹¹² Many others have offered proposals for the conditions under which the rule should and should not apply. See, e.g., Donald A. Dripps, *The Case for the Contingent Exclusionary Rule*, 38 AM. CRIM. L. REV. 1, 2–3 (2001); see also John Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1046 (1974) (limiting the rule in predetermined “serious” cases such as murder and kidnapping); Charles Alan Wright, *Must the Criminal Go Free if the Constable Blunders?*, 50 TEX. L. REV. 736, 744 (1972) (limiting the rule to cases of “outrageous” police misconduct).

¹¹³ Dripps, *supra* note 27, at 237 (“The Court consistently has jealously guarded its power over criminal procedure.”).

will not, no matter what the legislative branches tell them.¹¹⁴ But not every case requires a nuclear option. My proposal enhances judicial oversight, by creating incremental, legitimacy-enhancing remedies that will give the courts a range of options in those cases where they want to be able to act without paying the full price of letting a guilty party go free.

D. *Politics of Passage*

It is entirely possible that this proposal is a pipe dream.¹¹⁵ Liberals and libertarians, acting alone, may be an insufficient constituency for a proposal that on balance actually expands the protections offered by the Fourth Amendment. But this is not clearly a left/right issue. If Professor Tyler is correct, then people interested in voluntary compliance with law enforcement have an interest in getting the feedback loops right, so that the police know what kinds of behavior will make them legitimate in the eyes of the entire community.¹¹⁶ The current system skews the results very badly, because the people whose rights are driving the system are the very “perps” and defense lawyers least likely to be heard as legitimately delivering the message. Our adversarial system of criminal justice sets the morality play up in the minds of officers as bad guys against good guys, with the judges as umpires. Being recast into the role of bad guys when they violate the law—being reminded that they are legitimate when they too are required to follow the rules—will be good for the police. So there is a natural constituency on the political right based on appropriately limited government and effective law enforcement as well. An additional sweetener in the deal for law and order conservatives is the end to *mandatory* exclusion. The only way to see if the proposal could survive the rough and tumble of state politics is to put it on the table, and see how it works. Herein, I believe, is the virtue of thinking *small*.

V. CONCLUSION

The exclusionary rule as the sole means of enforcing our commitments to Fourth Amendment values has well-known inadequacies and distortionary effects. It also extracts high legitimacy prices from the courts. A more graduated remedy is needed. A liquidated damages regime and the creation of a constitutional small claims court offers a new way to address the problem. If adopted, it will bring a radically new mix of citizens before the courts, making their concerns available to the courts, legislators, the police and the public in important new ways. If the

¹¹⁴ *Id.*

¹¹⁵ Professor Dripps notes that many such proposals have been ignored over the years. See Dripps, *supra* note 80, at 791 (“Despite hostility to the exclusionary rule, and any number of proposals for reform, legislatures have not acted to provide alternative remedies.”).

¹¹⁶ See Tom R. Tyler & Jeffery Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 OHIO ST. J. CRIM. L. 231 (2008).

system were adopted, the legitimacy price that is paid to enforce the Fourth Amendment will be fundamentally altered. I predict that we will be able to buy increased compliance *ex ante*, not *ex post*, and avoid the costs of exclusion in many cases. And I suspect at a significantly lower price than people think.

On balance, the Court's Fourth Amendment jurisprudence makes it possible. Technology is converging to make constitutional small claims court possible by reducing transaction costs. Body-worn video and the internet have made it possible for a single magistrate to meaningfully administer such a system, so long as the adversarial commitments were relaxed, as they are in small claims court in civil cases. And a pilot test would be relatively inexpensive. The time if not yet here, is near. This essay is a call for the states to lay the groundwork for that new world.